
BEFORE THE IOWA BOARD OF PHYSICAL & OCCUPATIONAL THERAPY

Re:)	
)	
Petition for Declaratory Order on)	RULING ON PETITION FOR
Dry Needling)	DECLARATORY ORDER

LEGAL FRAMEWORK

“The declaratory order procedure under Iowa Code section 17A.9 permits persons to seek formal opinions on the effect of future transactions and arrange their affairs accordingly.” *Women Aware v. Reagen*, 331 N.W.2d 88, 92 (Iowa 1983). “Section 17A.9 contemplates rulings based on purely hypothetical facts, and renders them subject to review.” *Id.* “As a general rule, a petition for declaratory order is not a vehicle to adjudicate contested facts.” *City of Dubuque v. Iowa Utilities Bd.*, No. 2-1014 / 12-0789, 2013 WL 85807, at *6 (Iowa Ct. App. January 9, 2013).

Iowa Code section 17A.9(1)(a) allows any person to “petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency.” Section 17A.9(1)(b) requires that an agency issue a declaratory order in response to a petition unless issuance would be contrary to a rule adopted under section 17A.9(2) and prohibits an agency from issuing a declaratory order that would “substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.”

In accordance with section 17A.9(2), the Bureau of Professional Licensure enacted 645 IAC Chapter 8, which adopted the declaratory orders segment of the Uniform Rules on Agency Procedure. Rule 8.9(1) provides ten grounds under which a licensing board within the Bureau of Professional Licensure may refuse to issue a declaratory order on some or all of the questions raised. Those grounds are:

1. The petition does not substantially comply with the required form.
2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the agency to issue an order.
3. The agency does not have jurisdiction over the questions presented in the petition.
4. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.
6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.
7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.
8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.
9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.
10. The petitioner requests the agency determine whether a statute is unconstitutional on its face.

645 IAC 8.9(1)(1)-(10).

Section 17A.3 requires an agency to provide notice of petitions for declaratory orders it receives, while section 17A.4 allows qualified persons to intervene in proceedings for declaratory orders. Section 17A.5 requires an agency to do one of the following within thirty days of receiving a petition for declaratory order: issue a declaratory order, set the matter for specified proceedings, agree to issue a declaratory order by a specified time, or decline to issue a declaratory order.

PROCEDURAL HISTORY

On August 17, 2015, the Iowa Association of Oriental Medicine and Acupuncture (hereinafter "Petitioner") filed a petition (hereinafter "Petition") for a declaratory order pursuant to Iowa Code section 17A.9 and 645 IAC Chapter 8. The Petition requested a declaratory order from the Iowa Board of Physical & Occupational Therapy (hereinafter "Board") regarding dry needling. The Petition asked seven questions:

1. What are the medical and legal definitions of "trigger points", "Ashi Point", "intramuscular manual therapy", "dry needling" and "lifting/thrusting technique"?
2. Does the use of "trigger points" equate to the use of "Ashi" points?
3. Is Dry Needling/Intramuscular Manual Therapy a technique within the practice of acupuncture due to the utilization of a FDA regulated medical device, the acupuncture needle?

4. Is Dry Needling/Intramuscular Manual Therapy an invasive technique?
5. What type of training should be required?
6. How is the safety of the patient protected?
7. Who should be legally able to perform dry needling/intramuscular manual therapy?

On August 26, 2015, the Board provided notice of receipt of the Petition in accordance with section 17A.9(3) and scheduled a public hearing for September 11, 2015. On September 9, 2015, the American Physical Therapy Association and the Iowa Physical Therapy Association (hereinafter "Intervenors") jointly filed a Petition for Intervention pursuant to section 17A.9(4).

On September 11, 2015, the Board held a public hearing regarding the Petition. Petitioner agreed to amend the questions to be answered to add question 8: "Is dry needling within the scope of physical therapy as defined in Iowa Code section 148A.1(1)(b)?" Petitioner's answer to question 8 was "no." The Board voted to grant the Petition for Intervention filed by Intervenors, pursuant to section 17A.9(4). Both Petitioner and Intervenors agreed to allow the Board additional time to consider the Petition, pursuant to sections 17A.9(5) and (8). The Board established a 45-day public comment period regarding the Petition and set oral arguments on the Petition for December 11, 2015, in accordance with subsection 17A.9(5)(b). On September 14, 2015 the Board re-noticed the Petition, pursuant to subsection 17A.9(3), due to the addition of question 8. The notice provided an additional opportunity for intervention and provided details regarding submission of public comments and oral arguments.

On December 11, 2015, the Petitioner and Intervenors presented oral arguments before the Board. After the conclusion of the oral arguments, the Board discussed and deliberated the Petition. The Board voted to decline to answer questions 1 through 7. The Board voted to answer "yes" to question 8. The Board appointed a three-member committee to research the question of whether or not the Board should initiate rulemaking to specify the training and/or experience required to perform dry needling. The following is the Ruling on Petition for Declaratory Order (hereinafter "Ruling"), which becomes effective on the date of issuance.

REFUSAL TO ISSUE A DECLARATORY ORDER

The Board refuses to issue a declaratory order regarding questions 1 through 7, under 645 IAC 8.9(1)(6) because the facts or questions presented are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order. Questions 1 through 7 are insufficient and inappropriate because they do not ask about the applicability of a statute, rule, or order within the primary jurisdiction of the Board to specified circumstances, and therefore they are not questions that are appropriately resolved by petitioning for a declaratory order under section 17A.9(1)(a).

In addition to 645 IAC 8.9(1)(6), the Board has grounds to deny question 3 under 645 IAC 8.9(1)(3) because the Board does not have jurisdiction over the question presented, i.e., the definition of acupuncture. In addition to 645 IAC 8.9(1)(6), the Board has grounds to deny question 5 under 645 IAC 8.9(1)(5) because this question is more properly resolved through rulemaking. Any mandatory training requirements would need to be described by a rule of the Board. In addition to 645 IAC 8.9(1)(6), the Board has grounds to deny question 7 under 645 IAC 8.9(1)(3) and (5) because the Board does not have jurisdiction to answer this question as it pertains to practitioners other than physical therapists, and because other licensing boards are the appropriate bodies to resolve this question as it relates to the practitioners they regulate, respectively.

In considering whether to issue a declaratory order regarding question 8, the Board notes that the Petition does not contain facts sufficient to demonstrate that Petitioner will be aggrieved or adversely affected by the Board's failure to issue an order, which is a ground for refusing to issue a declaratory order under 645 IAC 8.9(1)(2). Petitioner is a professional association representing the interests of its members, who are practitioners of oriental medicine and acupuncture in Iowa. Petitioner has argued its interest in this matter is focused on patient safety, but Petitioner is not a patient advocacy association.

Regardless of whether Petitioner's apparent interest is sufficient to result in Petitioner being aggrieved or adversely affected by the Board's failure to issue a declaratory order, the Board is not required to decline to issue a declaratory order just because one of the grounds under 645 IAC 8.9(1) exists. Rather, 645 IAC 8.9(1) gives the Board the authority and the discretion to refuse to issue a declaratory order when one or more of the grounds apply, but notably does not require the Board to refuse to issue a declaratory order in these circumstances. The Board, in its discretion, chooses to issue a declaratory order to answer question 8 for a number of reasons. First, if the Intervenors had filed the Petition, instead of the Petitioner, there would not be a reason under 645 IAC 8.9(1)(2) to refuse to issue a declaratory order. It seems futile to refuse to issue a declaratory order because of the identity of the petitioner, particularly when an appropriate petitioner has intervened. Second, the Board has invested a substantial amount of time already in this Petition by listening to information presented at the public hearing and oral arguments and in reviewing the voluminous public comments received. It would not be a good use of the Board's time to dismiss all of this information without issuing a declaratory order when an appropriate petitioner could immediately petition the Board with the same question and start the process over again. Finally, the Board has repeatedly been asked the question of whether physical therapists can perform dry needling. Because the question has repeatedly been raised, it is important to the Board to issue more than an informal opinion on the question.

DEFINITION OF PHYSICAL THERAPY

Iowa Code section 148A.1(1)(b) provides the following definition: "'physical therapy' is that branch of science that deals with the evaluation and treatment of human capabilities and impairments. Physical therapy uses the effective properties of physical agents including, but not limited to, mechanical devices, heat, cold, air, light, water,

electricity, and sound, and therapeutic exercises, and rehabilitative procedures to prevent, correct, minimize, or alleviate a physical impairment. Physical therapy includes the interpretation of performances, tests, and measurements, the establishment and modification of physical therapy programs, treatment planning, consultative services, instructions to the patients, and the administration and supervision attendant to physical therapy facilities.”

The following definition of physical therapy is found in the Board’s administrative rules:

‘Physical therapy’ means that branch of science that deals with the evaluation and treatment of human capabilities and impairments, including:

1. Evaluation of individuals with impairments in order to determine a diagnosis, prognosis, and plan of therapeutic treatment and intervention, and to assess the ongoing effects of intervention;
2. Use of the effective properties of physical agents and modalities, including but not limited to mechanical and electrotherapeutic devices, heat, cold, air, light, water, electricity, and sound, to prevent, correct, minimize, or alleviate an impairment;
3. Use of therapeutic exercises to prevent, correct, minimize, or alleviate an impairment;
4. Use of rehabilitative procedures to prevent, correct, minimize, or alleviate an impairment, including but not limited to the following procedures:
 - Manual therapy, including soft-tissue and joint mobilization and manipulation;
 - Therapeutic massage;
 - Prescription, application, and fabrication of assistive, adaptive, orthotic, prosthetic, and supportive devices and equipment;
 - Airway clearance techniques;
 - Integumentary protection and repair techniques; and
 - Debridement and wound care;
5. Interpretation of performances, tests, and measurements;
6. The establishment and modification of physical therapy programs;

7. The establishment and modification of treatment planning;
8. The establishment and modification of consultive services;
9. The establishment and modification of instructions to the patient, including but not limited to functional training relating to movement and mobility;
10. Participation, administration and supervision attendant to physical therapy and educational programs and facilities.

645 IAC 200.1.

DEFINITION OF DRY NEEDLING

For purposes of this Ruling, the Board adopts the definition of dry needling formulated by the Federation of State Boards of Physical Therapy (FSBPT). Dry needling is a skilled technique performed by a physical therapist using filiform needles to penetrate the skin and/or underlying tissue to affect change in body structures and functions for the evaluation and management of neuromusculoskeletal conditions, pain, movement impairments, and disability.

ANALYSIS

The legislature has not enacted any statutes regarding dry needling; there is no statutory definition of dry needling and there are no explicit authorizations or prohibitions in statute regarding practitioners' use of this technique. Nothing in Iowa Code section 148A.1 explicitly permits or prohibits a physical therapist from performing dry needling. Rather, Iowa Code section 148A.1 uses very broad language to describe the definition of physical therapy. Given the lack of legislative direction in statute, the Board is forced to interpret its enabling act, specifically the definition of physical therapy in section 148A.1, to determine if dry needling can be performed by physical therapists in Iowa. The Board notes the legislature is free to enact one or more statutes defining dry needling, authorizing specific practitioners to perform dry needling, and/or prohibiting specific practitioners from performing dry needling. Any future statutory changes specifically addressing dry needling would supersede this Ruling.

Dry needling falls within the definition of physical therapy because it is a rehabilitative procedure used to prevent, correct, minimize, or alleviate a physical impairment. Under section 4 of the definition of physical therapy found at 645 IAC 200.1, the Board has provided a non-exhaustive list of rehabilitative procedures used by physical therapists. One listed example of a rehabilitative procedure is therapeutic massage. Physical therapists already utilize therapeutic massage of trigger points to prevent, correct, minimize, or alleviate physical impairments. According to Petitioner's explanation at oral argument, the only physiological difference in the effect of therapeutic massage of trigger points versus the effect of dry needling of a trigger point is in the degree of effect. Petitioner asserted that the physiological effect of dry needling of a trigger point is stronger than the physiological effect of therapeutic massage of a trigger

point. If utilizing therapeutic massage on trigger points is a common treatment modality in the practice of physical therapy, it is not unreasonable to conclude that utilizing a needle on trigger points, thus achieving a stronger but similar effect to therapeutic massage, should also be included in the practice of physical therapy. The Board does not advance the argument that dry needling is included under the category of therapeutic massage—it clearly is not. Rather, given the similarity between the procedures included in the non-exhaustive list of rehabilitative procedures in Board rule, it is not unreasonable for the Board to interpret rehabilitative procedures to also include dry needling.

The Board has been confronted with the question of whether physical therapists can perform dry needling on previous occasions. Each time, the request for clarification has been informal in nature. When faced with the question, the Board has consistently responded that it was the informal opinion of the Board that there was nothing in the laws and rules governing the practice of physical therapy to prohibit a physical therapist from performing dry needling, provided the physical therapist had adequate training to competently perform the technique. Therefore, at least on an informal basis, physical therapists have never been prohibited from performing dry needling in Iowa.

It is noteworthy that in the hundreds of pages of documents submitted to the Board for consideration in this matter, there is no evidence of any harm caused to Iowa patients as a result of a physical therapist performing dry needling. Rather, the potential for patient harm presented was purely hypothetical in nature. In addition, the Board has not received any complaints alleging harm caused by an Iowa licensed physical therapist performing dry needling.

Whether or not dry needling falls within the definition of physical therapy is a completely separate question from how much training should be required to perform it. At oral argument, Petitioner suggested that 1500 hours of training may be sufficient for physical therapists to perform dry needling. In making this suggestion, Petitioner acknowledged that physical therapists could perform dry needling without being an Iowa licensed acupuncturist. If a procedure is outside the scope of a particular profession, no amount of training can allow the practitioner to perform the procedure. Therefore, rather than being a question of scope of practice, the inquiry into physical therapists' ability to perform dry needling is more properly characterized as a question regarding training requirements.

The Board does not have the authority to determine whether or not dry needling is acupuncture. The Iowa Board of Medicine has exclusive jurisdiction over Iowa Code chapter 148E and the definition of acupuncture. It does appear to the Board that there are several differences between acupuncture and dry needling, including the following: the philosophy underlying the technique, the conditions or ailments the technique is designed to treat, the number of needles used in the treatment, and the length of time needles remain in the body. At a minimum, the Board recognizes that acupuncture encompasses a much broader range of techniques and treatments than dry needling. There are a number of techniques and treatments that would fall within the definition of acupuncture that are outside of the scope of dry needling as defined in this Ruling. Nothing in this Ruling authorizes a licensed physical therapist to perform acupuncture; rather this Ruling

authorizes a licensed physical therapist to perform dry needling, as defined in this Ruling, provided the physical therapist has adequate training to competently perform the procedure.

If a certain modality is within the scope of practice of physical therapy, the Board can, by rule, specify certain training requirements necessary to perform the modality. Currently, Board rules do not specify any requirements for any particular modalities. The basic standard that applies in the absence of specific requirements is that a physical therapist must be competent to perform any procedures they utilize and enforcement of competency is on a case-by-case basis through the complaint and disciplinary process. The Board has the authority to take disciplinary action against a physical therapist acting incompetently. The Board has already formed a committee to consider whether specifying minimum training requirements to be able to perform dry needling is necessary to protect the public health and safety of Iowans, and if so, to explore what those minimum training requirements should be. Nothing in this Ruling authorizes a physical therapist that lacks the competencies to perform dry needling to perform the procedure.

A recent FSBPT study found that 86% of the knowledge requirements needed to be competent in dry needling is acquired during the course of entry-level physical therapy education. The Board believes the study is credible, given its comprehensive nature, and finds it supportive of the position that dry needling is within the scope of physical therapy. Further, dry needling is not the first technique that uses needles to be utilized by physical therapists. In fact, in 2005, the Board issued an informal opinion concluding that electromyography was within the scope of physical therapy. Dry needling is not the first invasive technique within the scope of physical therapy, nor would it be the only technique that utilizes needles.

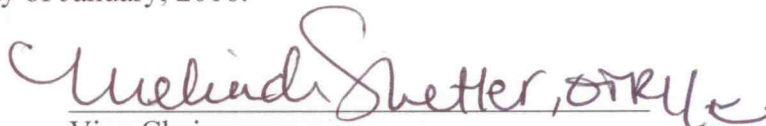
A number of public comments were received wherein the commenter indicated that they would not want to receive acupuncture from anyone other than a licensed acupuncturist. Notably, these commenters indicated they would not want acupuncture performed by several types of practitioners that have already been explicitly authorized by the legislature to perform acupuncture. These public opinions do not change the fact that these practitioners can legally perform acupuncture. If the public is interested in changing who can legally perform acupuncture, the legislature is the appropriate body to lobby. Additionally, this Ruling has no impact on an individual's choice as to what type of practitioner they go to for treatment of a particular problem. This Ruling does not require anyone to undergo dry needling with a physical therapist against their wishes. It is presumed that those commenters will choose not to seek out dry needling treatment from physical therapists. This Ruling allows others, including those who submitted comments about their positive experiences with dry needling by a physical therapist, to make their own choice in this regard.

RESPONSE TO QUESTION PRESENTED

Question 8: Is dry needling within the scope of physical therapy as defined in Iowa Code section 148A.1(1)(b)?

Answer: Yes.

This Ruling on the Petition for Declaratory Order is issued by the Iowa Board of Physical & Occupational Therapy on the 14th day of January, 2016.



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